E 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB970]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Offshore of New Jersey

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of Renewal incidental harassment authorization (IHA).

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a Renewal incidental harassment authorization (IHA) to Ocean Wind LLC (Ocean Wind) to incidentally harass marine mammals incidental to marine site characterization survey activities off the coast of New Jersey in the areas of the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS)-A 0498 (Lease Area) and federal and state waters along potential export cable routes (ECRs) to landfall locations between Raritan Bay (part of the New York Bight) and Delaware Bay.

DATES: This renewal IHA is valid May 10, 2022 to May 09, 2023 (one year from the expiration of the initial IHA).

FOR FURTHER INFORMATION CONTACT: Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the "take" of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq*.) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other "means of effecting the least practicable adverse impact" on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as "mitigation measures"). Monitoring and reporting of such takings are also required. The meaning of key terms such as "take," "harassment," and "negligible impact" can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each

reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a Renewal would allow for completion of the activities beyond that described in the **DATES** section of the initial IHA issuance, provided all of the following conditions are met:

(1) A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

(2) The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

(3) Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more

than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals*.

History of Request

On May 10, 2021, NMFS issued an IHA to Ocean Wind to take marine mammals incidental to marine site characterization survey activities off the coast of New Jersey in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0498) and along potential submarine cable routes to landfall locations in New Jersey (86 FR 6465), effective from May 10, 2021 through May 09, 2022. On February 18, 2022, NMFS received an application for the Renewal of that initial IHA. As described in the application for Renewal, the activities for which incidental take is requested are identical to those covered in the initial authorization. As required, the applicant also provided a preliminary monitoring report (available at *www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-llc-marine-site-characterization-surveys-new-jersey*) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. The notice of the proposed Renewal incidental harassment authorization was published on April 11, 2022 (87 FR 21098).

Description of the Specified Activities and Anticipated Impacts

Ocean Wind plans to conduct a second year of high-resolution geophysical (HRG) marine site characterization surveys in the Lease Area and along potential ECRs to landfall locations in New Jersey, between Raritan Bay (part of the New York Bight) and Delaware Bay. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the original IHA. The purpose of the marine site characterization surveys are to obtain an assessment of seabed (geophysical, geotechnical, and geohazard), ecological, and archeological conditions within the footprint of a planned offshore wind facility development. Surveys are also conducted to support engineering design and to map unexploded ordnance. Underwater sound resulting from Ocean Wind's site characterization survey activities, specifically HRG surveys, has the potential to result in incidental take of marine mammals in the form of Level B harassment.

In their 2020 IHA application, Ocean Wind estimated it would conduct surveys at a rate of 70 kilometers (km) per survey day. Ocean Wind defined a survey day as a 24-hour activity day. Based on the planned 24-hours operations, the number of estimated survey days varies between the Lease Area and ECR area, with 142 vessel survey days expected in the Lease Area and 133 vessel survey days in the ECR area, with a total of 275 survey days. A maximum of 2 vessels would operate concurrently in areas where 24-hr operations would be conducted, with an additional third vessel potentially conducting daylight-only survey effort in shallow-water areas. The Renewal IHA authorizes harassment of marine mammals for a second year of identical survey activities to be completed in one year, in the same area, using survey methods identical to those described in the initial IHA application; therefore, the anticipated impacts on marine mammals and the affected stocks also remain the same.

Accordingly, the amount of take requested for the Renewal IHA is also identical to that authorized in the initial IHA. All active acoustic sources and mitigation and

monitoring measures would remain exactly as described in the **Federal Register** notices of the initial proposed IHA (86 FR 17783; April 06, 2021) and issued initial final IHA (86 FR 26465; May 14, 2021).

The following documents are referenced in this notice and include important supporting information:

- Initial final IHA (86 FR 26465; May 14, 2021);
- Initial proposed IHA (86 FR 17783; April 06, 2021); and
- 2021 IHA application, references cited, and previous public comments

received (available at *www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-llc-marine-site-characterization-surveys-new-jersey*).

Detailed Description of the Activity

A detailed description of the planned marine site characterization survey activities may be found in the **Federal Register** notice of the IHA (86 FR 17783; April 06, 2021) for the initial authorization. Ocean Wind plans to complete the survey activities analyzed in the initial IHA by the date the IHA expires (May 09, 2022). The surveys Ocean Wind plans to conduct under this renewal would be a second year of identical surveys in the same area. The general location and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. The Renewal IHA is effective for a maximum period of one year from the date of issuance, with the expiration date not later than May 09, 2023 (one year from the expiration of the initial IHA).

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is planned here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (86 FR 17783; April 06, 2021). NMFS has reviewed the

preliminary monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. Newly available information is described below.

The draft 2021 Stock Assessment Reports (SARs, available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*) provide updated information for several stocks. Estimated abundance has increased for the U.S. population of gray seals (from 27,131 (CV = 0.19) to 27,300 (CV = 0.22)). Abundance estimates have decreased for Risso's dolphins (from 35,493 (CV = 0.19 to 35,215 (CV = 0.19)) and harbor seals (from 75,834 (CV = 0.15) to 61,336 (CV = 0.08)). Abundance estimates for North Atlantic right whales have also been updated in the draft 2021 SAR, which states that right whale abundance has decreased from 412 to 368 (95% CI 356-378) individuals (Hayes *et al.*, 2021).

Roberts *et al.* (2021) provided updated modeling methodology (statistical methods for characterizing model uncertainty) with updated monthly densities of North Atlantic right whales since the time of the initial IHA. This model also incorporated additional data from spring 2019 which added transect and sighting data. The new model results slightly increased density estimates for North Atlantic right whales in southern New England, but these results do not meaningfully impact the information supporting exposure estimation in the survey area here.

In addition, NMFS has recently acknowledged that the population estimate of NARWs is now under 350 animals (*https://www.fisheries.noaa.gov/species/north-atlantic-right-whale*). We anticipate that this information will be presented in the draft 2022 SAR. However, NMFS has determined that this change in abundance estimate would not change the estimated take of NARWs or authorized take numbers, nor affect our ability to make the required findings under the MMPA for the Ocean Wind survey activities. The status and trends of the NARW population remain unchanged.

NMFS has determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is authorized here may be found in the **Federal Register** notice for the proposed initial IHA (86 FR 17783; April 06, 2021). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, other scientific literature, and the public comments, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed (86 FR 17783; April 06, 2021) and final (86 FR 26465; May 14, 2021) initial IHAs. The acoustic source types, as well as source levels applicable to this renewal authorization, methods of take, and methodology of estimating take remain unchanged from the initial IHA. Accordingly, the stocks taken, type of take (*i.e.*, Level B harassment only), and amount of take remain unchanged from what was previously authorized in the previously issued IHA. The amount of take authorized through this renewal is indicated below in Table 1.

Table 1 -- Authorized Take and Proportion of Population Potentially Affected

Species		Abundance Estimate[1]	Takes by Level B Harassment	% Population
North Atlantic right whale	*Eubalaena glacialis*	368[2]	9	2.44%
Humpback whale	*Megaptera novaeangliae*	1,396	2	0.14%
Fin whale	*Balaenoptera physalus*	6,802	6	0.09%
Sei whale	*Balaenoptera borealis*	6,292	1	0.02%
Minke whale	*Balaenoptera acutorostrata*	21,968	2	0.01%
Sperm whale	*Physeter macrocephalus*	4,349	3	0.07%
Long-finned pilot whale	*Globicephala melas*	39,215	2	0.01%

Species		Abundance Estimate[1]	Takes by Level B Harassment	% Population
Common bottlenose dolphin (offshore)	*Tursiops truncatus*	62,851	262	0.42%
Common bottlenose dolphin (migratory)	*Tursiops truncatus*	6,639	1,410	21.24%
Short-finned pilot whale	*Globicephala macrorhynchus*	28,924	2	0.01%
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	93,233	16	0.02%
Atlantic spotted dolphin	*Stenella frontalis*	39,921	3	0.01%
Risso's dolphin	*Stenella frontalis*	35,215	30	0.09%
Common dolphin	*Delphinus delphis*	172,974	124	0.07%
Harbor porpoise	*Phocoena phocoena*	95,543	91	0.10%
Harbor seal	*Phoca vitulina*	61,336	11	0.02%
Gray seal	*Halichoerus grypus*	451,431	11	0.00%

W.N.A. = Western North Atlantic.
[1] Abundance estimates have been updated from the initial IHA (86 FR 26465; May 14, 2021) using the 2021 Draft SARs (Hayes *et al.*, 2021).
[2] The draft 2022 SARs have yet to be released; however, NMFS has updated its species webpage to recognize the population estimate for NARWs is now below 350 animals (*https://www.fisheries.noaa.gov/species/north-atlantic-right-whale*).

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (86 FR 26465; May 14, 2021), and the discussion of the least practicable adverse impact included in that document remains applicable. All mitigation, monitoring and reporting measures in the initial IHA are carried over to this Renewal IHA and summarized below.

- *Exclusion Zones (EZ)*: Marine mammal EZs would be established around the HRG survey equipment and monitored by PSOs during marine site characterization surveys as follows: A 500-m EZ for North Atlantic right whales during use of all acoustic sources, and a 100-m EZ for all other marine mammals during use of impulsive acoustic sources (*e.g.*, boomers and/or sparkers).
- *Ramp-up*: a ramp-up procedure would be used for HRG equipment capable of adjusting energy levels at the start or re-start of survey activities.
- *Shutdown of HRG Equipment*: If an HRG source is active and a marine mammal is observed within or entering a relevant EZ (as described above), an immediate

shutdown of the HRG survey equipment would be required. If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the Level B harassment zone (48 m, non-impulsive; 141 m impulsive), shutdown would occur.

- *Vessel strike avoidance measures*: Vessel strike measures include, but are not limited to, separation distances for large whales (500 m North Atlantic right whales, 100 m other large whales; 50 m other cetaceans and pinnipeds), restricted vessel speeds, and operational maneuvers.
- *Protected Species Observers (PSOs)*: A minimum of one NMFS-approved PSO would be on duty and conducting visual observations at all times during daylight hours (*i.e.,* from 30 minutes prior to sunrise through 30 minutes following sunset) and two active duty PSOs will be on watch during all nighttime operations.
- *Reporting*: Ocean Wind would submit a final technical report within 90 days following completion of the surveys. In the event that Ocean Wind personnel discover an injured or dead marine mammal, Ocean Wind shall report the incident to the Office of Protected Resources (OPR), NMFS and to the New England/Mid-Atlantic Regional Stranding Coordinator through the NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline as soon as feasible. In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, Ocean Wind shall report the incident immediately to OPR, NMFS and to the New England/Mid-Atlantic Regional Stranding Coordinator through the NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline.

Comments and Responses

A notice of NMFS' proposal to issue a Renewal IHA to Ocean Wind was published in the **Federal Register** April 11, 2022 (87 FR 21098). That notice either described, or referenced descriptions of, Ocean Wind's activity, the marine mammal species that may be affected by the activity, the anticipated effects on marine mammals and their habitat, estimated amount and manner of take, and proposed mitigation, monitoring and reporting measures. NMFS received comments from Clean Ocean Action and Save Long Beach Island (LBI). The comments and our responses are summarized below, and the letters are available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-llc-marine-site-characterization-surveys-new-jersey*). Please review the letters for full details regarding the comments and underlying justification. We note that LBI, in addition to providing comments via email, referenced and submitted a February 2022 letter originally submitted for a different action. Where appropriate, we respond herein to comments referenced from that letter. Full responses to the comments provided in that letter may be found in the notice of issuance of IHA to Atlantic Shores Offshore Wind, LLC (87 FR 24103; April 22, 2022).

Comment 1: LBI requested that NMFS extend the comment period for the proposed renewal IHA, asserting that the proposed renewal raises substantial concerns and that the proposed renewal notice does not provide sufficient information on which to evaluate the proposed action.

Response: NMFS disagrees with LBI's comments and does not grant the request. NMFS' IHA renewal process meets all statutory requirements. In prior responses to comments about IHA renewals (*e.g.*, 87 FR 24103; April 22, 2022, 84 FR 52464; October 2, 2019 and 85 FR 53342; August 28, 2020), NMFS has explained how the renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, and, further, promotes NMFS' goals of improving

conservation of marine mammals and increasing efficiency in the MMPA compliance process. The Notice of the proposed IHA published in the **Federal Register** on April 06, 2021 (86 FR 17783) made clear that the agency was seeking comment on the proposed IHA and the potential issuance of a renewal for this survey.

Because any renewal is limited to another year of identical or nearly identical activities in the same location or the same activities that were not completed within the 1-year period of the initial IHA, reviewers have the information needed to effectively comment on both the immediate proposed IHA and a possible 1-year renewal, should the IHA holder choose to request one in the coming months. While there would be additional documents submitted with a renewal request, for a qualifying renewal these would be limited to documentation that NMFS would make available and use to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. NMFS would also need to confirm, among other things, that the activities would occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information has been received that would alter the prior analysis. The renewal request would also contain a preliminary monitoring report, in order to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. The additional 15-day public comment period provides the public an opportunity to review these few documents, provide any additional pertinent information and comment on whether they think the criteria for a renewal have been met. Between the initial 30-day comment period on these same activities and the additional 15 days, the total comment period for a renewal is 45 days. In addition to the IHA renewal process being consistent with all requirements under section 101(a)(5)(D), it is also consistent with Congress'

intent for issuance of IHAs to the extent reflected in statements in the legislative history of the MMPA. Through the provision for renewals in the regulations, description of the process and express invitation to comment on specific potential renewals in the Request for Public Comments section of each proposed IHA, the description of the process on NMFS' website, further elaboration on the process through responses to comments such as these, posting of substantive documents on the agency's website, and provision of 30 or 45 days for public review and comment on all proposed initial IHAs and Renewals respectively, NMFS has ensured that the public is "invited and encouraged to participate fully in the agency's decision-making process", as Congress intended.

Moreover, NMFS disagrees with LBI's assertions regarding the supposed "substantial issues" presented by the proposed issuance of the renewal IHA. NMFS has addressed these concerns in detail through response to LBI's February 2022 letter (87 FR 24103; April 22, 2022), which was attached to its comments on this proposed action and, as appropriate relative to its comments on this action, we reiterate certain of those responses below.

Comment 2: COA asserted that NMFS has failed to appropriately account for cumulative impacts, noting that this was specifically important given the large number of offshore wind-related activities being planned in the northeast region. LBI provided similar concerns regarding NMFS' evaluation of cumulative impacts.

Response: Neither the MMPA nor NMFS' codified implementing regulations call for consideration of other unrelated activities and their impacts on populations. The preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989) states in response to comments that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Consistent with that direction, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts

on the baseline, *e.g.*, as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors. The 1989 final rule for the MMPA implementing regulations also addressed public comments regarding cumulative effects from future, unrelated activities. There NMFS stated that such effects are not considered in making findings under section 101(a)(5) concerning negligible impact. In this case, this renewal IHA, as well as other IHAs currently in effect or proposed within the specified geographic region, are appropriately considered an unrelated activity relative to the others. The IHAs are unrelated in the sense that they are discrete actions under section 101(a)(5)(D), issued to discrete applicants.

Section 101(a)(5)(D) of the MMPA requires NMFS to make a determination that the take incidental to a "specified activity" will have a negligible impact on the affected species or stocks of marine mammals. NMFS' implementing regulations require applicants to include in their request a detailed description of the specified activity or class of activities that can be expected to result in incidental taking of marine mammals. 50 CFR 216.104(a)(1). Thus, the "specified activity" for which incidental take coverage is being sought under section 101(a)(5)(D) is generally defined and described by the applicant. Here, Ocean Wind was the applicant for the renewal IHA, and we are responding to the specified activity as described in that application (and making the necessary findings on that basis).

Through the response to public comments in the 1989 implementing regulations, NMFS also indicated (1) that we would consider cumulative effects that are reasonably foreseeable when preparing a NEPA analysis, and (2) that reasonably foreseeable cumulative effects would also be considered under section 7 of the ESA for ESA-listed species, as appropriate. Accordingly, NMFS has written Environmental Assessments (EA) that addressed cumulative impacts related to substantially similar activities, in similar locations, *e.g.*, the 2017 Ocean Wind, LLC EA for site characterization surveys

off New Jersey; the 2018 Deepwater Wind EA for survey activities offshore Delaware, Massachusetts, and Rhode Island; the 2019 Avangrid EA for survey activities offshore North Carolina and Virginia; and the 2019 Orsted EA for survey activities offshore southern New England. Cumulative impacts regarding issuance of IHAs for site characterization survey activities such as those planned by Ocean Wind have been adequately addressed under NEPA in prior environmental analyses that support NMFS' determination that this action is appropriately categorically excluded from further NEPA analysis. NMFS independently evaluated the use of a categorical exclusion for issuance of Ocean Wind's renewal IHA, which included consideration of extraordinary circumstances.

Separately, the cumulative effects of substantially similar activities in the same geographic region have been analyzed in the past under section 7 of the ESA when NMFS has engaged in formal intra-agency consultation, such as the 2013 programmatic Biological Opinion for BOEM Lease and Site Assessment Rhode Island, Massachusetts, New York, and New Jersey Wind Energy Areas *(https://repository.library.noaa.gov/view/noaa/29291)*. Analyzed activities include those for which NMFS issued Atlantic Shores' 2020 IHA and subsequent 2021 renewal IHA (85 FR 21198; April 16, 2020 and 86 FR 21289; April 22, 2021), which are substantially similar to those planned by Ocean Wind under this current renewal IHA request and their previous 2021 IHA. This Biological Opinion determined that NMFS' issuance of IHAs for site characterization survey activities associated with leasing, individually and cumulatively, are not likely to adversely affect listed marine mammals. NMFS notes, that while issuance of this renewal IHA is covered under a different consultation, this BiOp remains valid and the surveys currently planned by Ocean Wind from 2022 to 2023 could have fallen under the scope of those analyzed previously.

Comment 3: LBI stated that NMFS should "consolidate" its review of Ocean Wind's request for renewal IHA with the recent IHA request made by Atlantic Shores Offshore Wind, LLC, suggesting that activities occurring within the same "specified geographical region" should be considered singly. LBI notes that the respective survey activities are occurring during similar timeframes in similar spatial locations.

Response: NMFS disagrees with this comment. We reiterate that section 101(a)(5)(D) of the MMPA requires NMFS to make a determination that the take incidental to a "specified activity" will have a negligible impact on the affected species or stocks of marine mammals, and will not result in an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses, and that the "specified activity" for which incidental take coverage is being sought under section 101(a)(5)(D) is appropriately defined and described by the applicant. Please see the response to Comment #2, regarding NMFS' analysis of cumulative impacts.

NMFS is required to consider applications upon request. To date, NMFS has not received any joint application from Ocean Wind and Atlantic Shores regarding their site characterization surveys off of New Jersey (or from any joint entity). While an individual company owning multiple lease areas may apply for a single authorization to conduct site characterization surveys across a combination of those lease areas (see 85 FR 63508, October 8, 2020; 87 FR 13975, March 11, 2022), this is not applicable in this case to the leases owned by Atlantic Shores and Orsted found off New Jersey. In the future, if applicants wish to undertake this approach, NMFS is open to the receipt of joint applications and additional discussions on joint actions.

Comment 4: COA asserted that NMFS is not using the best available science with regards to the North Atlantic right whale (NARW) population estimate and state that

NMFS should be using the 336 estimate presented in the recent North Atlantic Right Whale Report Card (*https://www.narwc.org/report-cards.html*).

Response: While NMFS agrees that the best available science should be used for assessing NARW abundance estimates, we disagree that the North Atlantic Right Whale Report Card (*i.e.*, Pettis *et al.* (2022)) study represents the best available estimate for NARW abundance. Rather the revised abundance estimate (368; 95 percent with a confidence interval of 356-378) published by Pace (2021) (and subsequently included in the 2021 draft Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports*)), which was used in the proposed renewal IHA, provides the most recent and best available estimate, and introduced improvements to NMFS' right whale abundance model. Specifically, Pace (2021) looked at a different way of characterizing annual estimates of age-specific survival. NMFS considered all relevant information regarding NARW, including the information cited by the commenters. However, NMFS relies on the SAR. Recently (after publication of the notice of proposed renewal IHA), NMFS has updated its species web page to recognize the population estimate for NARWs is now below 350 animals (*https://www.fisheries.noaa.gov/species/north-atlantic-right-whale*). We anticipate that this information will be presented in the draft 2022 SAR. We note that this change in abundance estimate would not change the estimated take of NARWs or authorized take numbers, nor affect our ability to make the required findings under the MMPA for Ocean Wind's survey activities.

NMFS further notes that the commenters seem to be conflating the phrase "best available data" with "the most recent data." The MMPA specifies that the "best available data" must be used, which does not always mean the most recent. As is NMFS' prerogative, we referenced the best available NARW abundance estimate of 368 from the

draft 2021 SARs as NMFS's determination of the best available data that we relied on in our analysis. The Pace (2021) results strengthened the case for a change in mean survival rates after 2010-2011, but did not significantly change other current estimates (population size, number of new animals, adult female survival) derived from the model. Furthermore, NMFS notes that the SARs are peer reviewed by other scientific review groups prior to being finalized and published and that the North Atlantic Right Whale Report Card (Pettis *et al.*, 2022) does not undertake this process.

Comment 5: COA and LBI assert that Level A harassment is reasonably likely to occur, and that this was not accounted for in NMFS' analysis.

Response: NMFS acknowledges the concerns brought up by the commenters regarding the potential for Level A harassment of marine mammals. However, no Level A harassment is expected to result, even in the absence of mitigation, given the characteristics of the sources planned for use. This is additionally supported by the required mitigation and very small estimated Level A harassment zones. Furthermore, the commenters do not provide any persuasive support for the apparent contention that Level A harassment is a potential outcome of these activities.

NMFS acknowledges that sufficient disruption of behavioral patterns could theoretically, likely in connection with other stressors, result in a reduction in fitness and ultimately injury or mortality. However, such an outcome could likely result only from repeated disruption of important behaviors at critical junctures, or sustained displacement from important habitat with no associated compensatory ability. NMFS has thoroughly analyzed the potential effects of noise exposure resulting from the specified activity and, as discussed in the initial notice of proposed IHA (see **Potential Effects of Specified Activities on Marine Mammals and Their Habitat**) and in this notice (see **Negligible Impact Analysis and Determination**), no such effects are reasonably anticipated to occur as a result of this activity. Therefore, no such outcome is expected as a result of

these surveys. NMFS considers this category of survey operations to be near *de minimis*, with the potential for Level A harassment for any species to be discountable. Please refer also to NMFS' response to comment 2.

Comment 6: COA and LBI do not agree with NMFS' negligible impact and small numbers findings for NARWs. Additionally, LBI finds fault with NMFS' approach to the small numbers determination, suggesting that a limit of one-third of the most relevant population abundance estimate is not appropriate and inconsistent with a prior court decision, citing the *NRDC v. Evans* decision of October 31, 2002. LBI goes on to suggest reevaluating the small numbers finding with specific regard to endangered species like NARW.

Response: NMFS disagrees with the commenters' position regarding the negligible impact analysis, and the commenters do not provide a reasoned basis for finding that the effects of the specified activity would be greater than negligible on any species or stock. The Negligible Impact Analysis and Determination section of the initial and proposed renewal IHA (86 FR 26465; 87 FR 21098) provides a detailed qualitative discussion supporting NMFS' determination that any anticipated impacts from this action would be negligible. The section contains a number of factors that were considered by NMFS based on the best available scientific data and why we concluded that impacts resulting from the specified activity are not reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

With specific regard to NARW, we note that take is authorized for only a very small percentage of the right whale population (see Table 1). We further note that Ocean Wind's previous monitoring report (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-llc-marine-site-characterization-surveys-new-jersey*) indicates that no right whales were taken during the previous activity. However, the

numbers of potential incidents of take or animals taken are only part of an assessment and are not, alone, decisively indicative of the degree of impact. In order to adequately evaluate the effects of noise exposure at the population level, the total number of take incidents must be further interpreted in context of relevant biological and population parameters and other biological, environmental, and anthropogenic factors and in a spatially and temporally explicit manner. The effects to individuals of a "take" are not necessarily equal. Some take events represent exposures that only just exceed a Level B harassment threshold, which would be expected to result in lower-level impacts, while other exposures occur at higher received levels and would typically be expected to have comparatively greater potential impacts on an individual. Further, responses to similar received levels may result in significantly different impacts on an individual dependent upon the context of the exposure or the status of the individuals (*e.g.*, if it occurred in an area and time where concentrated feeding was occurring, or to individuals weakened by other effects). In this case, NMFS reiterates that no such higher level takes are expected to occur. The maximum anticipated Level B harassment zone is 141 m, a distance smaller than the precautionary shutdown zone of 500 m. To the extent that any exposure of NARW does occur, it would be expected to result in lower-level impacts that are unlikely to result in significant or long-lasting impacts to the exposed individual and, given the relatively small amount of exposures expected to occur, it is unlikely that these exposures would result in population-level impacts. NMFS acknowledges that impacts of a similar degree on a proportion of the individuals in a stock may have differing impacts to the stock based on its status, *i.e.*, smaller stocks may be less able to absorb deaths or reproductive suppression and maintain similar growth rates as larger stocks. However, even given the precarious status of the NARW, the low-level nature of the impacts expected to occur for only a few individuals means that the population status does not weigh meaningfully in NMFS' consideration of population-level impacts. The

commenters provide no substantive reasoning to contradict this finding, and do not support their assertions of effects greater than NMFS has assumed may occur.

Additionally, the initial IHA was subject to a section 7 consultation, with NMFS Greater Atlantic Regional Fisheries Office (GARFO) as the consulting agency. NMFS GARFO determined that issuance of the initial IHA to Ocean Wind was not likely to adversely affect listed species or the critical habitat of any ESA-listed species or result in the take of any marine mammals in violation of the ESA. During the initial consultation, GARFO considered the potential for a renewal. The proposed renewal IHA provides no new information about the effects of the action, nor does it change the extent of effects of the action, or any other basis to require re-initiation of the Opinion; therefore, the incidental take statement issued for the initial IHA remains valid.

NMFS disagrees with LBI's arguments on the topic of small numbers. Although there is limited legislative history available to guide NMFS and an apparent lack of biological underpinning to the concept, we have worked to develop a reasoned approach to small numbers. NMFS explains the concept of "small numbers" in recognition that there could also be quantities of individuals taken that would correspond with "medium" and "large" numbers. As such, NMFS considers that one-third of the most appropriate population abundance number—as compared with the assumed number of individuals taken—is an appropriate limit with regard to "small numbers." This relative approach is consistent with the statement from the legislative history that "[small numbers] is not capable of being expressed in absolute numerical limits" (H.R. Rep. No. 97-228, at 19 (September 16, 1981)), and relevant case law (*Center for Biological Diversity v. Salazar*, 695 F.3d 893, 907 (9th Cir. 2012) (holding that the U.S. Fish and Wildlife Service reasonably interpreted "small numbers" by analyzing take in relative or proportional terms)). In regards to LBI's suggestion that the one-third number is inconsistent with prior caselaw, we note that LBI cited the *NRDC v. Evans* decision of October 31, 2002

(232 F. Supp. 2d 1003), which was related to the plaintiffs' motion for a preliminary injunction. Ultimately, after parties' cross-motions for summary judgment, the Evans court held that NMFS' regulatory definition of small numbers (which NMFS did not apply here) improperly conflated the small numbers and negligible impact issues. *NRDC v. Evans,* 279 F. Supp. 2d 1129 (N.D. Cal. 2003). Contrary to LBI's suggestion, the Evans court expressly stated that it was not setting any numerical limit for small numbers. NRDC v. Evans, 279 F. Supp. 2d at 1153. As for LBI's suggestion to reconsider small numbers specifically for NARW, the argument to establish a small numbers threshold on the basis of stock-specific context is unnecessarily duplicative of the required negligible impact finding, in which relevant biological and contextual factors are considered in conjunction with the amount of take.

Comment 7: COA is concerned regarding the number of species that could be impacted by the activities, as well as a lack of baseline data being available for species (in particular, harbor seals) in the area. In addition, COA has stated that NMFS did not adequately address the potential for cumulative impacts to bottlenose dolphins from Level B harassment over several years of project activities.

Response: We appreciate the concern expressed by COA. NMFS utilizes the best available science when analyzing which species may be impacted by an applicant's proposed activities. Based on information found in the scientific literature, as well as based on density models developed by Duke University, all marine mammal species included in the proposed renewal **Federal Register** Notice have some likelihood of occurring in Ocean Wind's survey areas. Furthermore, the MMPA requires us to evaluate the effects of the specified activities in consideration of the best scientific evidence available and, if the necessary findings are made, to issue the requested take authorization. The MMPA does not allow us to delay decision making in hopes that additional information may become available in the future. Furthermore, NMFS notes

that it has previously addressed discussions on cumulative impact analyses in previous comments and references COA back to these specific responses in this Notice. Regarding the lack of baseline information cited by COA, with specific concern pointed out for harbor seals, NMFS points towards two sources of information for marine mammal baseline information: the Ocean/Wind Power Ecological Baseline Studies, January 2008-December 2009 completed by the New Jersey Department of Environmental Protection in July 2010 (*https://dspace.njstatelib.org/xmlui/handle/10929/68435*) and the Atlantic Marine Assessment Program for Protected Species (AMAPPS; *https://www.fisheries.noaa.gov/new-england-mid-atlantic/population-assessments/atlantic-marine-assessment-program-protected*) with annual reports available from 2010 to 2020 (*https://www.fisheries.noaa.gov/resource/publication-database/atlantic-marine-assessment-program-protected-species*) that cover the areas across the Atlantic Ocean. NMFS has duly considered this and all available information. Based on the information presented, NMFS has determined that no new information has become available, nor do the commenters present additional information, that would change our determinations since the publication of the proposed notice.

Comment 8: LBI suggested that the notice lacks sufficient technical data, and referred to their February 2022 letter in which it requested that NMFS explain why a 20 dB transmission loss coefficient was applicable to the analysis or to present a new analysis using a 15 dB transmission loss coefficient.

NMFS' response: NMFS first acknowledges that the notice of proposed renewal IHA does not include the same level of technical information as was presented in the initial notice of proposed IHA. This was purposeful, as the information relied upon is the same as that presented in the initial notice, and in the proposed renewal notice, NMFS

referred the reader to those initial notices, stating that the notices provide important supporting information (*e.g.*, initial proposed IHA notice; 86 FR 17783; April 06, 2021).

In its February 2022 letter providing comments on the proposed issuance of an IHA to Atlantic Shores, LBI states that NMFS' assumption that use of a 20logR transmission loss factor (*i.e.,* spherical spreading) is inappropriate, and states that "According to a number of scientific sources, the use of a noise propagation loss coefficient of 20 dB per tenfold increase in distance represents "spherical spreading" and is only appropriate in the "near field" where the calculated horizontal distance is comparable with the water depth." NMFS disagrees with that comment, and reiterates its response below. NMFS also notes that LBI did not cite any such scientific sources, so NMFS must evaluate LBI's recommendations based only on its comment.

A major component of transmission loss is spreading loss and, from a point source in a uniform medium, sound spreads outward as spherical waves ("spherical spreading") (Richardson *et al.,* 1995). In water, these conditions are often thought of as being related to deep water, where more homogenous conditions may be likely. However, the theoretical distinction between deep and shallow water is related more to the wavelength of the sound relative to the water depth, versus to water depth itself. Therefore, when the sound produced is in the kilohertz range, where wavelength is relatively short, much of the continental shelf may be considered "deep" for purposes of evaluating likely propagation conditions.

As described in the initial notice of proposed IHA, the area of water ensonified at or above the root mean square (RMS) 160 dB threshold was calculated using a simple model of sound propagation loss, which accounts for the loss of sound energy over increasing range. Our use of the spherical spreading model (where propagation loss = 20 * log [range]; such that there would be a 6-dB reduction in sound level for each doubling

of distance from the source) is a reasonable approximation over the relatively short ranges involved. Even in conditions where cylindrical spreading (where propagation loss = 10 * log [range]; such that there would be a 3-dB reduction in sound level for each doubling of distance from the source) may be appropriate (*e.g.,* non-homogenous conditions where sound may be trapped between the surface and bottom), this effect does not begin at the source. In any case, spreading is usually more or less spherical from the source out to some distance, and then may transition to cylindrical (Richardson *et al.,* 1995). For these types of surveys, NMFS has determined that spherical spreading is a reasonable assumption even in relatively shallow waters (in an absolute sense) as the reflected energy from the seafloor will be much weaker than the direct source and the volume influenced by the reflected acoustic energy would be much smaller over the relatively short ranges involved.

In support of its position, LBI cites several examples of use of practical spreading (a useful real-world approximation of conditions that may exist between the theoretical spreading modes of spherical and cylindrical; 15logR) in asserting that this approach is also appropriate here. However, these examples (U.S. Navy construction at Newport, RI, and NOAA construction in Ketchikan, AK) are not relevant to the activity at hand. First, these actions occur in even shallower water (*e.g.,* less than 10 m for Navy construction). Of greater relevance to the action here, pile driving activity produces sound with longer wavelengths than the sound produced by the acoustic sources planned for use here. As noted above, a determination of appropriate spreading loss is related to the ratio of wavelength to water depth more than to a strict reading of water depth. NMFS indeed uses practical spreading in typical coastal construction applications, but for reasons described here, uses spherical spreading when evaluating the effects of HRG surveys on the continental shelf. In addition, this analysis is likely conservative for other reasons,

e.g., the lowest frequency was used for systems that are operated over a range of frequencies and other sources of propagation loss are neglected.

NMFS has determined that spherical spreading is the most appropriate form of propagation loss for these surveys and has relied on this approach for past IHAs with similar equipment, locations, and depths. Please refer back to the 2022 Atlantic Shores HRG IHA (87 FR 24103; April 22, 2022), Garden State HRG IHA (83 FR 14417; April 4, 2018) and the 2019 Skipjack HRG IHA (84 FR 51118; September 27, 2019) for examples. Prior to the issuance of these IHAs (approximately 2018 and older), NMFS typically relied upon practical spreading for these types of survey activities. However, as additional scientific evidence became available, including numerous sound source verification reports, NMFS determined that this approach was inappropriately conservative and, since that time, as consistently used spherical spreading. Furthermore, NMFS' User Spreadsheet tool assumes a "safe distance" methodology for mobile sources where propagation loss is spherical spreading (20LogR) (*https://media.fisheries.noaa.gov/2020-12/User_Manual%20_DEC_2020_508.pdf?null*), and NMFS calculator tool for estimating isopleths to Level B harassment thresholds also incorporates the use of spherical spreading.

Determinations

The survey activities planned by Ocean Wind are identical to those analyzed in the initial IHA, including the planned number of days and general location of activity (*i.e*., OCS-A 0498 and OCS-A 0532), as are the method of taking and the effects of the action. Therefore, the amount of authorized take is unchanged from that authorized in the initial IHA. The potential effects of Ocean Wind's activities remain limited to Level B harassment in the form of behavioral disturbance. No serious injury or mortality of marine mammal is anticipated. In analyzing the effects of the activities in the initial IHA,

NMFS determined that Ocean Wind's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third of the abundance of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of Ocean Wind's monitoring report and changes in estimated abundances of the affected stocks. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will affect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Ocean Wind's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq*.) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our final action (*i.e.*, the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human

environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the Renewal IHA qualifies to be categorically excluded from further NEPA review.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq*.) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

The NMFS Office of Protected Resources is authorizing the incidental take of four species of marine mammals that are listed under the ESA: the North Atlantic right, fin, sei and sperm whales. We requested initiation of consultation under Section 7 of the ESA with NMFS GARFO on February 04, 2021, for the issuance of the initial IHA. NMFS GARFO determined that issuance of the IHA to Ocean Wind is not likely to adversely affect the North Atlantic right, fin, sei, and sperm whale or the critical habitat of any ESA-listed species or result in the take of any marine mammals in violation of the ESA, and at this time considered the potential for a renewal. The Renewal IHA provides no new information about the effects of the action, nor does it change the extent of effects of the action, or any other basis to require re-initiation of the Opinion; therefore, the incidental take statement issued for the initial IHA remains valid.

Renewal

NMFS has issued a Renewal IHA to Ocean Wind for the take of marine mammals incidental to conducting marine site characterization surveys offshore of New Jersey, from May 10, 2022 to May 09, 2023.

Dated: May 10, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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